Supreme Court, U.S.
FILED

No. 00-886 NOV 28 2000

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 2000

JENNY MANYBEADS, et al.
Petitioners,

v.

UNITED STATES OF AMERICAL, et al.
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

JOHN TREBON
TREBON & FINE, P.C.
308 N. Aggasiz
Flagstaff, AZ 86001
(520) 779-1713
Counsel of Record

Lee Brooke Phillips
Robert Malone
224 East Birch Avenue
Flagstaff, AZ 86001
(520) 779-1560
Attorneys for Petitioners

54pp

QUESTIONS PRESENTED

1 DOES THE SOVEREIGN IMMUNITY OF AN INDIAN TRIBE THAT CHOOSES TO ABSENT ITSELF FROM A LAWSUIT BAR A CLAIM BY INDIDVIDUAL INDIANS AGAINST THE FEDERAL GOVERNMENT WHICH CHALLENGES THE CONSTITUTIONALITY OF A FEDERAL STATUTE AND WHICH SEEKS ONLY PROSPECTIVE INJUNCTIVE AND DECLARATORY RELIEF FROM THE FEDERAL GOVERNMENT AND NOTHING FROM THE ABSENT TRIBE?

2. CAN THE UNITED STATES ADEQUATELY REPRESENT THE INTEREST OF AN INDIAN TRIBE WHICH VOLUNTARILY ABSENTS ITSELF FROM A LAWSUIT WHERE CONGRESS HAS DIRECTED THE GOVERNMENT TO REPRESENT POTENTIALLY CONFLICTING INTERESTS OF THE ABSENT TRIBE AND OTHER PARTIES, WHERE THE UNITED STATES ASSERTS THAT IT CAN REPRESENT BOTH INTERESTS, WHERE THE ABSENT TRIBE CAN OFFER NO EXAMPLE OF ANY ACTUAL CONFLCIT WITHIN THE CONTEXT OF THE LITIGATION AND WHICH OTHERWISE DENIES THE OTHER PARTY ANY ALTERNATIVE FORUM TO CHALLENGE THE CONSTITUTIONALITY OF A FEDERAL STATUTE?

3. DOES AN INDIAN TRIBE THAT FULLY PARTICIPATES IN LITIGATION AND MEDIATION OF A LAWSUIT INCLUDING THE PREPARATION AND PROPOSAL OF SETTLEMENT AGREEMENTS WHICH ARE ACCEPTED BY THE OTHER PARTIES AND WHICH UNJUSTLY ENRICH THE TRIBE, WAIVE ITS SOVEREIGN IMMUNITY OR IN THE ALTERNATIVE SHOULD IT BE ESTOPPED FROM CLAIMING IMMUNITY?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed below.

JENNY MANYBEADS, YELLOWWOMAN YAZZIE, ASHKIE BITSI, IRENE YAZZIE, BLANCHE WILSON, WALDINE YAZZIE, DAN R. YAZZIE, BESSIE BEGAY, MAE WILSON TSO, ASKIE TSO, EARL TSO, SAM W. TSO, BETTY A. TSO, FIONA TSO, JOE BENALLY ,RUTH BENALLY, ALICE BENALLY, LOUISE BENALLY, VIOLET ASHKIE, KEE SHAY, MAE SHAY, ELSIE SHAY, ZONNIE KATANEY, JOHN KATANEY, JANE BIAKEDDY, SLIM BIAKEDDY, KATHERINE SMITH, MARY ROSE BEDONIE, ROBERTA BLACKGOAT, PAULINE WHITESINGER, SARAH BEGAY, BESSIE NEZ, WILSON NEZ, JR., LIVINGSTON NEZ, LILLIAN SONNIE, NELLICH WALTERS, HARRY NEZ, BESSIE HATATHLIE, JACK HATATHLIIE, ELLA BEDONIE, LENORE HILL, GENEVIEVE HATATHLIE, WILLY BEGAY, MARK CHARLEY, IDA MAE CLINTON, HARRIET WILSON, KEE WATCHMAN, DINE' DAYIKAH ADA YALT'I (DDAY) (Voice of the Navajo Families), FRANCES BAHE, MARGARET BAHE, ALICE TSOSIE, LOUISE BEGAY, MARY T. BEGAY, ALFRED McCABE, ANNA BEGAY, CLARENCE BLACKROCK, ZONNIE BAHE, JOHN YAZZIE, MAE YAZZIE, MARY BLACKROCK, EVA LEE, LETA O'DANIEL, ELISE BENALLY, LUCILLE B. BENALLY, RAMON CALVIN BAHE, *Petitioners,*

UNITED STATES OF AMERICA, DONALD P. HODEL, in his official capacity as Secretary of the Department of Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES BUREAU OF INDIAN AFFAIRS, ROSS O. SWIMMER, in his official capacity as Assistant Secretary of the Department of Interior, HAWLEY ATKINSON, in his official capacity as Chairman of the Navajo Hopi Relocation Commission, THE NAVAJO HOPI INDIAN RELOCATION COMMISSION, an independent federal agency, *Respondents*

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....ii

OPINIONS BELOW.....1

JURISDICTION.....1

STATUE INVOLVED.....1

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....11

I. The United States Court of Appeals for the Ninth Circuit Has Decided an Important Federal Question in a Way That Conflicts with Decisions of the Fifth Circuit Court of Appeals, the Tenth Circuit Court of Appeals and Several District Courts in the Eighth Circuit 11

II. The Ninth Circuit Decided an Important Federal Question: When Can the United States Adequately Represent the Interest of an Indian Tribe that Chooses to Absent Itself From a Lawsuit, in a way that Conflicts with Decisions of this Court and of the Ninth Circuit Itself.....18

III. The Hopi Tribe Through Its Actions and Conduct Has Waived its Sovereign Immunity or Should be Estopped from Using its Immunity to Deny Petitioners Access to the Only Forum Available to Them to Test the Constitutionality of the 1974 Relocation Act.....23

CONCLUSION.....27

APPENDIX.....1a

TABLE OF AUTHORITES

Cases

Anrig v. Ringsby United, 603 F.2d 1319 (9th Cir. 1978) 26

Arizona v. California, 460 U.S. 605 (1983) 20

Attakai v. United States, 21 F.3d 1111 (9th Cir. 1994) 2

Babbitt v. Youpee, 519 U.S. 234 (1997) 23

Blackfeet Indian Nation v. Hodel, 634 F.Supp. 646 (D.Mont. 1986) 20

Boerne v. Flores, 117 S. Ct. 2157 (1997) 9

Burlington Northern v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991) 17

C&L Enterprises, Inc., v. Citizen Potawatomi Nation, S.Ct. No. 00-292 11, 16

Calvello v. Yankton Sioux Tribe, 584 N.W.2d 108 (S.D. 1998) 14

Clinton v. Babbitt, 180 F.3d 1081 (9th Cir. 1999) 19

County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980) 22

Edelman v. Jordan, 415 U.S. 651 (1974) 17

Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999) 13

Hamilton v. MacDonald, 503 F.2d 1138 (9th Cir. 1974) 2

Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1971) 2, 5

Healing v. Jones (II), 210 F.Supp. 125 (D. Ariz. 1962) 4

Healing v. Jones (II), 210 F.Supp. 125, (D. Ariz. 1962) 4

Hodel v. Irving, 481 U.S. 704 (1987) 23

Hopi Indian Tribe v. Hale, 118 F.3d 1371 (9th Cir. 1997) 2

Hopi Tribe v. Navajo Tribe, 46 F.3d 908 (9th Cir. 1995) 2

Hopi Tribe v. Watt, 530 F. Supp. 1217 (D.Ariz. 1982), aff'd, 719 F.2d 314 (9th Cir. 1983) 2

Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed. 2d 981 (1998) 12

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) 6

Makah Indian Tribe v. Verity, 910 F.2d 555 (9th Cir. 1990) 17, 20

TABLE OF AUTHORITES - Continued

Masayesva v. Zah, 65F.3d 1445 (9th Cir. 1995) 2

Maxam v. Lower Sioux Indian Community of Minnesota, 829 F.Supp. 277 (D.Minn. 1993) 15

Mescalero Apache Tribe v. State of New Mexico, 131 F.3d 1379 (10th Cir. 1997) 14

Nevada v. United States, 463 U.S. 110 (1983) 19

Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505, 516, 111 S.Ct. 905. 913 (1996) 16

Peabody Coal Co. v. Navajo Nation, 75 F.3d 457 (9th Cir. 1996) 2

Prescription Plan Service Corp. v. Frances, 552 F.2d 493 (2d Cir. 1977)26

Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 88 S.Ct. 733 (1968) 19

Ray v. Atlantic Richfield Co., 435 U.S. 151, 156-57 n. 6, 98 S.Ct. 988 (1978) 17

Rita, Inc., v. Flandreau Santee Sioux Tribe, 798 F.Supp. 586 (D.S.D.1992) 15

Ross v. v. Flandreau Santee Sioux Tribe, 809 F.Supp.738 (D.S.D.1992). 15

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct.1670(1978) 13

Sekaquaptewa v. MacDonald, 544 F.2d 396 (9th Cir. 1976) 2

Sekaquaptewa v. MacDonald, 575 F.2d 239 (9th Cir. 1978) 2

Sekaquaptewa v. MacDonald, 591 F.2d 1289 (9th Cir. 1979) 2

Sekaquaptewa v. MacDonald, 616 F.2d 801 (9th Cir. 1980) 2

Sekaquaptewa v. MacDonald, 626 F.2d 113 (9th Cir. 1980) 2

Sekaquaptwea v. MacDonald, 575 F.2d 239, 241 (9th Cir. 1998) 5

Sidney v. MacDonald, 536 F.Supp. 420 (D.Ariz. 1982) 2

Sidney v. Zah, 718 F.2d 1453 (9th Cir. 1983) 2

Southwest Center for Biological Diversity v. Babbitt, 150 F.3d 1152 (9th Cir. 1998) 21, 22

Thomas v. United States, 189 F.3d 662 (7th Cir. 1999) 23

TTEA v. Ysleta del sur Pueblo, 181 F.3d 676 (5th Cir. 1999) 12

United States v. Kabinto, 456 F.2d 1087 (9th Cir. 1972) 2

TABLE OF AUTHORITES - Continued

Washington v. Daley, 173 F.3d 1159 (9th Cir. 1999) 21

White Mountain Apache Tribe v. Hodel, 784 F.2d 921 (9th Cir. 1986).... 20

White Mountian Apache Tribe v. Clark, 604 F.Supp. 185 (D.Ariz 1984) 20

Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765 (D.C.Cir. 1986) 23

Statutes

Pub. L. No. 93-531, 88 Stat. 712 (1974), amended by Publ. L. No. 96-305, 94 Stat. 930 (1980) and Publ. L. No. 104-301, 110 Stat., 402 (1996), codified in 25 U.S.C. §§ 640d et. seq. 2, 3, 5, 6

Other Authorities and Publications

D. Brown, Bury My Heart At Wounded Knee (1970) 3

J. Correll & A. Dehiya, Anatomy Of The Navajo Indian Reservation: How It Grew 3

L. Kelly, The Navajo Indians and Federal Indian Policy 5 (1968) 3

R. Locke, The Book Of The Navajo (1979) 3

Supplemental Report From the Committee on Indian Affairs, providing for the settlement of the Navajo-Hopi Land dispute, and other purposes, S. Rep. 104-363, 104th Cong. 2d Sess at (September 9, 1996) 8

United States Comm. On Civil Rights, The Navajo Nation: An American Colony 15 (Sept. 1975) 3

The above named Petitioners respectfully pray that a *writ of certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceeding on April 18, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 209 F.3d 1164 (9th Cir. 2000), and is contained in the Appendix attached hereto, p. 1a, *infra*.

The memorandum decision of the United States District Court for the District of Arizona (Carroll, D.J.) is reported at 730 F. Supp. 1515 (1989). A copy of that decision is contained in the Appendix attached hereto, p. 5a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 USC § 1331 and 1346, Petitioners brought this suit in the Federal District Court for the District of Columbia on January 26, 1988. The Defendants filed a motion to transfer the case to the Federal District Court for the District of Arizona which was granted on February 29, 1988. On September 20, 1989, the District Court granted the Federal Defendants Rule 12 (b) (6) Federal Rules of Civil Procedure motion to dismiss and denied Plaintiffs' motion for a preliminary and permanent injunction. See 5a, *infra*.

On Petitioners' appeal, the Ninth Circuit on April 18, 2000, entered a judgment and opinion affirming the District Court's order dismissing Petitioners' complaint. See p. 1a, *infra*. A petition for rehearing was denied on July 31, 2000. A copy of the July 31, 2000 order is contained in the Appendix attached hereto, p. 16a, *infra*.

On October 20, 2000, Justice O'Connor ordered that the time for filing this Petition for *Writ of Certiorari* be extended to and including November 28, 2000.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 USC § 1254 (1).

STATUTE INVOLVED

The decision below involved an interpretation of Rule 19 Federal Rules of Civil Procedure and not of any statute.

STATEMENT OF THE CASE

Petitioners are Navajo Indians who in 1988 filed suit against the United States and several federal agencies and officials challenging the constitutionality, and seeking to enjoin enforcement, of the forced relocation provisions of the Navajo-Hopi Indian Lands Settlement Act of 1974 Pub. L. No. 93-531, 88 Stat. 1712 (1974) (codified as amended in 25 USC § 640d (1982)) ("Relocation Act"). Petitioners allege that the Relocation Act, violates their constitutional right to the free exercise of their religion by requiring them to relocate from the sacred land which connects them to their spiritual world and their Creator, contrary to their religious teachings and beliefs. Further that the Relocation Act, by separating them from their sacred homelands, prevents the further free exercise of Petitioners' religion. Petitioners also allege that they have been denied equal protection under the law because the federal government has historically permitted "similarly situated" non-Indians who have occupied Indian land, to settle similar land claims with the payment of money rather than by their forced relocation.

The land dispute at issue in this case between Petitioners, the federal government, the Navajo Nation and the Hopi Tribe is well over 100 years old and has spawned four (4) federal statutes[1], dozens of federal lawsuits[2], a new federal agency[3] and has resulted in the largest forced

---

[1] Pub. L. No. 85-547, 72 Stat. 402 (1958); Pub. L. No. 93-531, 88 Stat. 712 (1974); Pub. L. No. 96-305, 94 Stat. 929 (1980); Pub. L. No. 104-301, 110 Stat., 3649 (1996).

[2] See, e.g., Masayesva ex rel. *Hopi Indian Tribe v. Hale*, 118 F.3d 1371 (9th Cir. 1997); *Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457 (9th Cir. 1996); *Masayesva v. Zah*, 65F.3d 1445 (9th Cir. 1995); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir. 1995); *Attakai v. United States*, 21 F.3d 1111 (9th Cir. 1994). The related lawsuits in which the Hopi Tribe is a party include *Hopi Tribe v. United States*, Civ. Nos. 319-84L, 320-84L, 321-84L and 651-89L pending in the United States Court of Federal Claims; *Hopi Tribe v. Navajo Tribe et al.*, Civ. 85-801 PHX-EHC, pending in the United States District Court for the District of Arizona; *Hopi Tribe v. Wat*, 530 F. Supp. 1217 (D.Ariz. 1982), aff'd, 719 F.2d 314 (9th Cir. 1983); *Sidney v. MacDonald*, 536 F.Supp. 420 (D.Ariz. 1982), aff'd *Sidney v. Zah*, 718 F.2d 1453 (9th Cir. 1983); *Sekaquaptewa v. MacDonald*, 626 F.2d 113 (9th Cir. 1980); *Sekaquaptewa v. MacDonald*, 616 F.2d 801 (9th Cir. 1980); *Sekaquaptewa v. MacDonald*, 591 F.2d 1289 (9th Cir. 1979); *Sekaquaptewa v. MacDonald*, 575 F.2d 239 (9th Cir. 1978); *Sekaquaptewa v. MacDonald*, 544 F.2d 396 (9th Cir. 1976); *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974); *United States v. Kabinto*, 456 F.2d 1087 (9th Cir. 1972); *Hamilton v. Nakai*, 453 F.2d 152 (9th Cir. 1971).

[3] The federal Navajo and Hopi Indian Relocation Commission (NHIRC) was created by Pub. L. No. 93-531, § 12 (1974), 88 Stat. 1716, amended by Pub. L. No. 96-305, § 5

relocation of any racial group in this country this century with the exception of the relocation and internment of 120,000 persons of Japanese ancestry during World War II.[4]

Petitioners' claims arise from a dispute over the right to occupy and use land located in northern Arizona which has been occupied and used by Petitioners and their ancestors for generations. Petitioners' ancestors were previously forcibly relocated from their homelands by the federal government following the invasion of the Navajo territory by Kit Carson and the United States Army in 1863.[5] More than 8,500 Navajos were forced to march to Fort Sumner, New Mexico on what became known as the infamous "Long Walk."[6] In 1868 this catastrophic relocation policy was aborted and the Navajos who had survived were marched back to their homelands.[7] A peace treaty was also signed establishing the original Navajo reservation located to the east of the land at issue in this case.[8] As white settlers moved westward the Navajos and the other southwestern tribes continued to be pushed westward and closer together.[9]

In 1882 President Chester Arthur signed an Executive Order which created a new reservation west of the 1868 Navajo reservation for the settlement of Indians by the Secretary of Interior.[10] The 1882 Executive Order area, which contains the lands at issue in Petitioners'

(1980), 94 Stat. 932 (codified in 25 USC § 640d-11). (Later renamed Office of Navajo and Hopi Indian Relocation).

[4] On February 19, 1942, President Roosevelt signed Executive Order No. 9066, 3CFR § 1092 (1942), which authorized the Secretary of War to establish military areas and regulate travel within them. The Military Doctorate of Compulsory Relocation Program requiring persons of Japanese ancestry to report to and to remain at designated relocation centers and internment camps.

[5] L. KELLY, THE NAVAJO INDIANS AND FEDERAL INDIAN POLICY 5 (1968).

[6] *Id.* At 6. See also R. LOCKE, THE BOOK OF THE NAVAJO at 323-87 (1979)

[7] The relocation effort was a catastrophe for the Navajo: 2,000 died there – one quarter of the number interned – in 4 years." UNITED STATES COMM. ON CIVIL RIGHTS, THE NAVAJO NATION: AN AMERICAN COLONY 15 (Sept. 1975). See also D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970).

[8] Treaty of 1868, United States – Navajo Tribe, 15 Stat. 667.

[9] See generally J. CORRELL & A. DEHIYA, ANATOMY OF THE NAVAJO INDIAN RESERVATION: HOW IT GREW. See also R. LOCKE, *supra,* note 6, and D. BROWN, *supra,* note 7.

lawsuit, consists of approximately 1.8 million acres of land which has, for generations, been inhabited by Petitioners' families, other Navajos and members of the Hopi Tribe.

With the discovery of coal, uranium and other natural resources, conflicts over the 1882 reservation increased. In 1958, Congress passed Pub. L. No. 85-547, 72 Stat. 403 (1958) which waived the Tribes' immunity from suit and authorized the Navajo and Hopi Tribes to participate in a lawsuit that would determine the rights and interests in the 1882 Executive Order area.[11] The 1958 Act also "vested" title to the land in both Tribes.[12] The Hopi Tribe filed suit claiming that the Navajos were occupying Hopi Land.[13] The Navajo Tribe filed a counterclaim for exclusive rights to those areas that Navajo families inhabited.[14]

In 1962 *Healing v. Jones* (II), 210 F.Supp. 125 (D. Ariz. 1962), cert. denied, 373 U.S. 758 (1963) (per curiam), was decided. The *Healing* Court ruled that except for one-sixth of the land which had been customarily used exclusively by the Hopis, the Hopi and Navajo Indian Tribes have "joint, undivided, and equal interests as to the surface and sub-surface including all resources appertaining thereto, subject to the trust title of the United States."[15] The area of exclusive Hopi use became the Hopi Reservation known as "District 6".[16] The remaining disputed land became known as the Joint Use Area (JUA). The *Healing* Court left

---

[10] Executive Order of President Chester Arthur, December 16, 1882, reprinted in *Healing v. Jones (II)*, 210 F.Supp. 125, 129 n. 1 (D. Ariz. 1962), *Aff'd*, 373 U.S. 758 (1963) (per curiam).

[11] The act authorized the tribal governments to commence or to defend an action on behalf of their tribes, "including all villages and clans thereof, and on behalf of any Navajo or Hopi Indians claiming an interest in the area" of the 1882 Executive Order Reservation. Pub. L. No. 85-547 at § 1. A three judge federal court was given jurisdiction to "determine[d] their rights and interest ... in and to said lands and quiet title thereto." *Id.*

[12] Section I of the 1958 Act provides the lands described in the Executive Order of December 16, 1882 are "held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of Interior pursuant to such Executive Order."

[13] *Healing v. Jones (II)*, 210 F.Supp. 125 (D. Ariz. 1962), *Aff'd.*, 373 U.S. 758 (1963) (per curian).

[14] *Id.*

[15] 210 F.Supp. at 192.

[16] See *Healing v. Jones(II)*, 210 F.Supp. at 158-59.

unresolved the issue of how the undivided interest might be fairly administered or divided.[17]

In 1972, the Hopi Tribe sued to restrict Navajo land use in the JUA.[18] On October 14, 1972 the Federal District Court issued a Writ of Assistance and Order of Compliance, directing the Navajo tribal chairman and the Department of Interior to reduce Navajo livestock in the joint use area by 85%. The order also prohibited any "new construction" by members of the Navajo Tribe on the JUA without a permit issued by both tribes.

Joint use of the 1882 reservation continued until 1974 when Congress passed Pub. L. No. 93-531.[19] Its most significant provision gave the United States District Court for Arizona jurisdiction to partition the JUA and directed a 50/50 division.[20] An independent federal agency, The Navajo-Hopi Indian Relocation Commission (NHIRC), was established to relocate those Indians, who following partition of the land, were left living on the "wrong side of the line."[21]

In 1977 the District Court approved the partitioned line which divided the JUA into Hopi Partitioned Land (HPL) and Navajo Partitioned Land (NPL).[22] The JUA has always been occupied, almost exclusively, by members of the Navajo Tribe but also used by Hopis who lived in nearby District 6. As a result, while nearly 15,000 Navajo individuals were subject to the relocation requirement only approximately 100 Hopis were required to relocate. All members of both tribes were supposed to be relocated by July 1986. Due to the strong opposition to forced relocation, thousands of Navajos, including Petitioners, had not relocated by the 1986 deadline.

---

[17] 210 F.Supp. at 191, 192.

[18] *Hamilton v. Nakai*, 453 F.2d 152 (9th Cir. 1971), cert. denied., 406 U.S. 945.

[19] 88 Stat. 1714 (1974), amended by Pub. L. No. 96-305, 94 Stat. 930 (1980), codified in 25 USC § 640d-640d-28 (1983).

[20] 25 USC § 640d-5 (1983). Congress mandated five criteria for partition of the JUA lands. In so far as practicable, the boundary line had to: 1) include the higher density population areas in each tribe; 2) result in lands equal in acreage and quality; 3) result in partitioned lands contiguous to each tribes reservation; and 4) facilitate fencing. In addition, Congress directed that the exclusive Hopi Reservation (District 6) not be reduced or limited. *Id.*

[21] 25 USC § 640d-11.

[22] The February 10, 1997 partition order was unpublished. See *Sekaquaptewa v. MacDonald*, 575 F.2d 239, 241 (9th Cir. 1998).

In 1980, Congress amended the 1974 Act.[23] The 1980 amendments authorized payment of attorneys fees for both Tribes in the continuing litigation, increased authorizations for the operating expenses of the relocation commission, gave each tribe jurisdiction over the lands partitioned to it, and directed the Secretary of Interior to "take such action as may be necessary in order to assure the protection … of the rights and property of individuals subject to relocation."[24]

In 1988 Petitioners filed their lawsuit on behalf of themselves and all similarly situated Navajo individuals who faced involuntary relocation. Prior to ruling on Petitioners' motion for class certification, the District Court granted the federal defendants Rule 12 (b) (6) motion to dismiss.[25] The District Court's decision to dismiss Petitioners lawsuit was based upon its misinterpretation of this Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).[26]

Petitioners appealed the dismissal and oral argument on Petitioners' appeal was heard on April 10, 1991 by the Ninth Circuit. On May 10, 1991, the Ninth Circuit issued its decision stating that it would be in the best interest of the parties to settle the lawsuit. The Court therefore directed Petitioners and the federal government to initiate settlement discussions under the direction of a court appointed mediator.[27] The court also authorized the Navajo Nation and Hopi Tribe, which had participated in the litigation as amicus curie, to participate as parties in the settlement proceedings.[28] The court's May 1991 order also deferred submission of the appeal.[29]

The four parties then engaged in mediation and settlement negotiations from 1991 to 1998. The Hopi Tribe was represented by

---

[23] Pub. L. No. 96-305, 94 Stat. 932; 25 USC § 640d-28 (1983)

[24] 25 USC § 640d-25, 27 (a); 640d-24 (a) (5); 25 USC § 640d-9 (e); 25 USC § 640d-9 (c).

[25] 730 F.Supp. 1515 (1989).

[26] *Lyng*, which involved the discretionary decision making of the U.S. Forest Service to build a road through unoccupied forest service land, did not, as in this case, involve a federal statute which required individuals to act contrary to their religious beliefs and teachings by involuntarily relocating them from their sacred homelands and therefore prohibiting further exercise of their religion.

[27] May 10, 1991 order of the Court of Appeals (contained in Appendix attached hereto, p. ____, *infra*).

[28] *Id.*

[29] *Id.*

counsel and participated at all stages of the mediation. During the mediation, the Hopi Tribe drafted a settlement proposal which was given to the Navajos. The initial proposal was overwhelmingly rejected. Following further mediation the Hopi Tribe drafted and proposed the "Accommodation Agreement."[30] The Accommodation Agreement offered eligible Navajos an opportunity to remain on the HPL for a period of seventy-five (75) years. Under the terms of the Accommodation Agreement, eligible Navajo families are entitled to lease for seventy-five (75) years a three (3) acre homesite, ten (10) acres of farmland and may engage in other traditional uses of the HPL, the Accommodation Agreement also increased grazing available on the HPL to eligible Navajos and lifts the court ordered construction freeze for those families who signed the Agreement.[31]

In addition, through the *Manybeads* mediation, the Hopi Tribe and the United States, on December 14, 1995, entered into a "Settlement Agreement" in which the Hopi Tribe promised to offer the Accommodation Agreement to the Navajo families and abide by its terms. The Hopi Tribe also agreed to dismiss three existing lawsuits against the United States. In exchange the United States agreed to pay up to 50.2 million dollars to the Hopi Tribe and, under specified circumstances, to take into trust for the Hopi Tribe up to 500,000 acres of land that the Tribe might acquire.[32] The Settlement Agreement contained a clear waiver of immunity by the Hopi Tribe which provides:

---

[30] Accommodation Agreement (contained in 2nd supplemental excerpts of record accompanying the supplemental brief for the federal appellees at tab 3)

[31] Petitioners and other Navajos residing on HPL continue to express their opposition to the Accommodation Agreement because of its burden on their free exercise of religion. Specifically, Navajo residents of HPL object to the lack of a permanent right to remain on their sacred land, the Hopi Tribe's prohibition on Navajo burials on HPL, limitations and restrictions on Navajo grazing, the Hopi Tribe's failure to negotiate a dispute resolution process as required by the Agreement, the Hopi Tribe's failure to provide the guaranteed number of homesites and grazing allocation to the Navajo residents and the lack of third party review or mechanisms for enforcing the Agreement.

[32] The Settlement Agreement and the 1996 Act provide that funds be paid out in the following manner: (1) the Hopi Tribe will receive $2.4 million once the Tribe files a motion to dismiss its appeal in the Ninth Circuit in *Secakuku v. Hale*; (2) the Hopi Tribe will receive $22.7 million once legislation extending the Tribe's leasing authority to 75 years has been enacted and once the Tribe's claims in the Court of Federal Claims for damages due to any Federal action which occurred before 1982 are dismissed; (3) the Hopi Tribe will receive $10 million once 65% of the Navajo families residing on the Hopi

> The United States and the Tribe hereby agree that the provisions of this Settlement Agreement shall be enforceable in either the United States Court of Federal Claims in Washington, D.C., or in the United States District Court in Phoenix, Arizona, as appropriate.

The Hopis' two settlement proposals were then presented to Congress for approval. On October 11, 1996 the Navajo-Hopi Land Dispute Settlement Act of 1996 was enacted. Pub. Law. No. 104-301 (1996). In the 1996 Act Congress found that it is in the public interest for the Petitioners and other Navajo residents of the HPL, the Hopi Tribe and the United States to reach a peaceful resolution of the long standing land dispute. The 1996 Act, approved, ratified and confirmed the Hopi Tribe's Accommodation Agreement and Settlement Agreement negotiated in the *Manybeads* mediation.[33]

In 1996, the *Manybeads* Plaintiffs and the federal defendants filed a joint motion for a remand to a District Court for the limited purpose of class certification and approval of the Accommodation Agreement as a settlement of the *Manybeads* lawsuit. On remand, the District Court conducted a four (4) day "fairness" hearing. On February 21, 1997, following days of emotional testimony for and against the proposed settlement and prior to a ruling on the fairness of the proposed settlement, the Hopi Tribe advised the Court and the parties that Petitioners could accept the Hopis' Accommodation Agreement without agreeing to dismiss their appeal. In other words, Petitioners could accept the Accommodation

---

reservation have signed an Accommodation Agreement or have chosen to relocate and once the Hopi Tribe's claims in the Court of Federal Claims for livestock trespass damages against the United States from 1983 through 1988 are dismissed; (4) the Hopi Tribe will receive $15.1 million once 75% of the Navajo families residing on the Hopi reservation have signed an Accommodation Agreement or have chosen to relocate and once the Hopi Tribe's claims in the Court of Federal Claims for livestock trespass damages against the United States from 1989 through and including 1996 are dismissed; and (5) once 85% of the Navajo families residing on the Hopi reservation have signed an Accommodation Agreement or have chosen to relocate, the Secretary shall take into trust for the Hopi Tribe up to 500,000 acres of rural lands in northern Arizona, consistent with the terms of the Settlement Agreement and the 1996 Settlement Act. See S. Rep. 104-363, 104th Cong. 2d Sess. at 35-47 (1996); See also Supplemental Brief of Federal Appellees at p. 3-6.

[33] See Supplemental Report From the Committee on Indian Affairs, providing for the settlement of the Navajo-Hopi Land dispute, and other purposes, S. Rep. 104-363, 104th Cong. 2d Sess at (September 9, 1996) contained in 2nd supplement excerpts of record accompanying the supplemental brief for federal appellees at tab 4, 5 and 14.

Agreement and still pursue their constitutional challenge of the Relocation Act in federal court. The Hopi Tribe's proposal provided the parties with a "win-win" opportunity. Relying on the Hopi Tribe's stated position, the parties filed a "Joint Motion to Withdraw Motion for Certification of a Class and Stipulation of Settlement". In the joint motion the parties stated:

> At the fairness hearing in Mid-February, it became evident that many families had an interest in hearing from the Court of Appeals on their legal claims in this lawsuit. As the parties talked further with the families in February and March of this year, they determined that the best chance of solving the long term problem lay in affording the families the opportunity to both sign an agreement and to pursue their appeal, thus affording them a "win-win" choice. Prior to the fairness hearing, only five of the eligible homesites had agreed to sign an agreement that once the "win-win" option was presented to them, another 77 homesites signed agreements with the understanding they could pursue the *Manybeads* appeal.[34]

Once the Hopi Tribe's "win-win" offer was presented to them, an additional seventy-seven (77) of the ninety-six (96) eligible occupied homesites signed Agreements with the understanding that the Ninth Circuit would decide Petitioners' constitutional challenge to the Relocation Act. The District Court also granted the parties' Motion for Withdrawal of the Motion to Certify the Class and Approve the Stipulation of Settlement that would have required the dismissal of Petitioners' lawsuit.

The *Manybeads* lawsuit was then returned to the Ninth Circuit for a decision on Petitioners' constitutional claims. The parties filed supplemental briefs on the First and Fourteenth Amendment claims. The supplemental briefs also addressed the effect Congress' enactment of the Religious Freedom Restoration Act of 1992 ("RFRA") and this Court's decision in *Boerne v. Flores*, 117 S. Ct. 2157 (1997) have on Petitioners' free exercise claim. Following the parties supplemental briefing but prior

---

[34] Joint motion to withdraw motion for certification of a class and stipulation of settlement, CR497 at p.2 (copy included in 2nd supplemental excerpts of the record accompanying the supplemental brief for the federal appellees at tab 9).

to the supplemental oral argument, the Ninth Circuit, *sua sponte*, directed the parties to also brief the issue of whether the Hopi Tribe is a necessary party to the lawsuit who can not be joined because of its sovereign immunity. This issue had not been considered or decided by the District Court.

Petitioners filed their supplemental brief arguing that the Hopi Tribe is not a necessary party to a lawsuit seeking injunctive and declaration relief from a federal statute. Further, that if the Hopi Tribe was a necessary party, it is adequately represented by the United States government. The federal defendants filed a supplemental brief agreeing with Petitioners that the United States was an adequate representative for the Hopi Tribe if the Hopi Tribe was a necessary party to the litigation. The Hopi Tribe filed its supplemental brief arguing that it was a necessary and indispensable party which can not be joined because of its sovereign immunity, that the U.S. can not adequately represent it and that the *Manybeads* lawsuit must therefore be dismissed.

On April 18, 2000, the Ninth Circuit affirmed the dismissal of Petitioners lawsuit finding the Hopi Tribe to be a necessary and indispensable party who could not be joined because of its sovereign immunity. Further, that the United States could not adequately represent the interests of the Hopi Tribe because of an alleged conflict between the United States' trust duty owed to the Hopi Tribe and to the Petitioners. The Ninth Circuit based its decision on the argument of counsel for the Hopi Tribe and without the benefit of any evidence or factual findings by the District Court on the issue of the Hopi Tribe's claim of indispensability, the United States position that it could adequately represent the interests of the Hopi Tribe or whether any actual conflict existed which would prevent the United States from adequately representing the interests of the Hopi Tribe.

On July 31, 2000, the Ninth Circuit denied Petitioners' motion for rehearing. Petitioners now seek review of the Ninth Circuit's decision in the only remaining forum available for review of their constitutional challenges to their involuntary relocation from their sacred ancestral homelands by the federal government.

REASONS FOR GRANTING THE WRIT

I. The United States Court of Appeals for the Ninth Circuit Has Decided an Important Federal Question in a Way That Conflicts with Decisions of the Fifth Circuit Court of Appeals, the Tenth Circuit Court of Appeals and Several District Courts in the Eight Circuit

The decision below fails to directly address an important federal question- whether an Indian Tribe's sovereign immunity necessarily extends to actions which only seek prospective equitable relief. The appeals court dismissed Petitioners' claims, founded on alleged violations by the Respondent United States of rights guaranteed by the United States Constitution, for failure to join *amicus* Hopi Tribe. The court determined that the Tribe was a necessary party which could not be joined by reason of its sovereign immunity and dismissed Petitioners' suit under Rule 19(b) of the Federal Rules of Civil Procedure. The court failed to address the issue of the Tribe's sovereign immunity as it relates to the nature of Petitioners' claims and the relief requested. In so doing the Ninth Circuit decided on a definition of the parameters of tribal sovereign immunity in a way that conflicts with decisions of the Fifth Circuit Court of Appeals, the Tenth Circuit Court of Appeals, and several district courts in the Eighth Circuit.

In the instant case Petitioners are asking for prospective equitable relief only. They seek a declaration that the relocation requirements of the Relocation Act would deprive them of their right to the free exercise of religion under the First Amendment and their right to the equal protection of the laws under the Fourteenth Amendment, and seek an injunction to prevent the Respondent United States from taking actions to involuntarily remove them from their sacred homeland. Petitioners complain of no action by *amicus* Hopi Tribe, nor do they seek relief from the Tribe.

On October 30, 2000, this Court accepted *certiorari* in the case of *C&L Enterprises, Inc., v. Citizen Potawatomi Nation*, 00-292. The issue presented was whether the execution of an arbitration agreement by an Indian tribe constitutes a waiver of sovereign immunity to a state court suit against the tribe to enforce an arbitration award. As set forth in the Petition for Writ of *certiorari* a decision on that question by the Oklahoma Appellate Court conflicts with decisions of two federal circuits and two

state courts of last resort. The question presented in *C&L Enterprises* is closely related to the question here. The issue encompassing both questions is the extent to which sovereign immunity shields a tribe from suit. Like the conflicting decisions regarding waiver of sovereign immunity in the arbitration agreement context, contradictory decisions on the relation of sovereign immunity to the nature of relief requested has resulted in confusion as to when the assertion of sovereign immunity requires dismissal of a lawsuit. The ambiguity and inconsistency among courts as to the extent of tribal sovereign immunity requires clarification and direction from this Court.

The question of whether an Indian tribe's sovereign immunity bars actions against the tribe for prospective equitable relief was addressed by the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of appeals in conflicting decisions handed down in July, 1999. In *TTEA v. Ysleta del sur Pueblo*, 181 F.3d 676 (5th Cir. 1999), the Fifth Circuit ruled that tribal sovereign immunity is not a bar to an action for declaratory or injunctive relief. The defendants in the case were tribal officials of Ysleta del Sur Pueblo and the tribe itself.[35] The appeals court examined this Court's decision in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998), noting that it "was an action for damages, not a suit for declaratory or injunctive relief. This difference matters." *Ysleta*, 181 F.3d at 680. As to the type of relief sought and its relation to sovereign immunity the Fifth Circuit concluded:

> The distinction between a suit for damages and one for declaratory or injunctive relief is eminently sensible, and nothing in *Kiowa* undermines the relevant logic. State sovereign immunity does not preclude declaratory or injunctive relief against state officials. *See Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity.

---

[35] Ysleta was an action by a corporation seeking federal court intervention in a suit against the corporation in tribal court. Although ruling that the tribe's sovereign immunity was not a bar to the action because the corporation was requesting injunctive relief only, the Fifth Circuit ruled that the corporation had failed to exhaust tribal remedies and that jurisdiction was proper in the tribal court in this instance.

> *Cf. Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

Id.

The appeals court found that this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct.1670(1978), finding "a tribal governor not immune from a suit seeking declaratory and injunctive relief against enforcement of a tribal ordinance.." controls. *Id.* However, the *Ysleta* court went further, finding that none of the defendants, tribal officials, and the tribe itself, were shielded from suit.[36]

The day following the opinion in *Ysleta* the Eleventh Circuit issued its opinion in *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999). The State of Florida alleged that the tribe was conducting certain gaming operations in violation of the Indian Gaming Regulatory Act (IGRA).[37]The Eleventh Circuit rejected the conclusion reached by other courts, see *infra*, that a tribe waives its sovereign immunity to claims for injunctive and declaratory relief by electing to engage in gaming subject to regulation under IGRA the appeals court also rejected the State of Florida's additional argument that the bar of sovereign immunity should not extend to an action for injunctive relief, taking the position that all waivers of sovereign immunity must be explicitly stated:

> [W]e decline to modify the doctrine of tribal sovereign immunity absent an express command to the contrary from either Congress or a majority of the Supreme Court. Accordingly, we reject the State's argument that the Tribe's immunity does not necessarily extend to this action for prospective equitable relief.

181 F.3d at 1245.

The Tenth Circuit addressed the issue of tribal sovereign immunity and claims for equitable relief in *Mescalero Apache Tribe v.*

---

[36]Also cited was Justice Stevens' concurrence in *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 515, 111 S.Ct. 905 (1991) (Stevens, J. concurring), suggesting that sovereign immunity might not extend "to claims for prospective equitable relief against a tribe." *Ysleta*, 181 F.3d at 680.

[37] 25 U.S.C. §§ 2701-21 (1994).

State of New Mexico, 131 F.3d 1379 (10th Cir. 1997), adopting a mid-way position between Ysleta and Seminole Tribe. This was an action by a tribe to compel the state of New Mexico to negotiate in good faith to achieve a compact permitting gaming on the reservation pursuant to IGRA. The State filed a counterclaim against the tribe seeking a declaration that the gaming compact was invalid. The tribe responded to the counterclaim, asserting that the court lacked jurisdiction by reason of the tribe's sovereign immunity. Upon reviewing the district court's rejection of the tribe's defense, the Tenth Circuit concluded:

> While there is sparse case law on the issue it appears the majority supports the view that IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and *where only declaratory or injunctive relief is sought.*

131 F.3d at 1385 (emphasis added).

The issue of whether sovereign immunity would bar an action for injunctive relief in other contexts beyond compliance with IGRA was not addressed in Mescalero. The Eleventh Circuit rejected the reasoning of the Tenth Circuit in finding that a tribe engaging in gaming under the IGRA waives it sovereign immunity, opting for a stricter standard to determine when a tribe "expressly and unequivocally" waives immunity. Seminole Tribe, *supra*, 181 F.3d at 1243. But this appears to be the minority position.

The Supreme Court of South Dakota recently observed that: "A majority of courts conclude that IGRA waives tribal sovereign immunity in instances where compliance with IGRA is at issue and *where only declaratory or injunctive relief is sought.*" *Calvello v. Yankton Sioux Tribe*, 1998 SD 107, 584 N.W.2d 108, 114 n.4 (S.D. 1998) (emphasis added) Recent federal district court decisions in the Eighth Circuit have concluded that a tribe is not shielded from suit where the relief sought is equitable in nature. Most, like *Calvello* and *Mescalero, supra.*, are in the context of a case where compliance with the provisions of IGRA are at issue.[38] These cases recognize that IGRA does not provide for an express

---

[38] Courts have found a waiver of tribal sovereign immunity under the enforcement provisions of other federal acts where an "unequivocal expression" of such waiver is

waiver of tribal sovereign immunity. The cases are consistent in noting the distinction in the type of relief requested and determining that a tribe will only be guaranteed immunity from suit where there is a claim for damages.

In *Ross v. v. Flandreau Santee Sioux Tribe,* 809 F.Supp.738 (D.S.D.1992), members of the tribe challenged the tribe's distribution of casino profits. The tribe moved for dismissal on the ground of sovereign immunity. The court ruled that it had jurisdiction but only with regard to equitable relief and that "tribal sovereign immunity protects the Tribe from entry of a judgment for monetary damages…", 809 F.Supp.at 745.

In *Rita, Inc., v. Flandreau Santee Sioux Tribe*, 798 F.Supp. 586 (D.S.D.1992), the management company for a casino operated by the tribe sought a temporary restraining order to prevent the tribe from removing the company as manager. The district court, over the objections of the tribe, found it had federal question jurisdiction under the IGRA but denied the requested injunction because the plaintiff failed to show the likelihood of success on the merits. The court did not discuss the issue of the tribe's sovereign immunity, apparently because only injunctive relief was requested.

The District Court for the District of Minnesota has likewise held that "when an Indian tribe engages in gaming governed by the IGRA, it waives its immunity to suit for the narrow purpose of determining compliance with the requirements of the Act." *Maxam v. Lower Sioux Indian Community of Minnesota*, 829 F.Supp. 277, 281 (D.Minn. 1993). *Maxam* was another case of tribal members suing the tribe over the distribution of gaming profits. In considering the plaintiffs' claims for both injunctive relief and money damages the court held that:

> [T]his court likely has jurisdiction to hear the present request for equitable relief. The court's exercise of jurisdiction for purposes of this motion is confined to consideration of a request for injunctive relief. The court does not today consider plaintiffs' separate claims seeking

---

lacking. Osage Tribal Council v. U.S.Dept. of Labor, 187 F.3d 1174 (10th Cir. 1999), Safe Drinking Water Act; Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094,1097 (8th Cir.1989), Resource Conservation and Recovery Act,; Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community, 827 F.Supp. 608 (D.Ariz. 1993), Clean Water Act and Resource Conservation and Recovery Act.

> money damages. The Supreme Court in *Potawatomi* held by implication that a tribe's sovereign immunity from actions for money damages 'does not necessarily extend to actions seeking equitable relief.'.

Maxam, 829 F.Supp. at 281-82, citing *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 516, 111 S.Ct. 905. 913 (1996), (Stevens, J., concurring).

Calvello v. Yankton Sioux Tribe, 899 F.Supp. 431 (D.S.D. 1995), App. Dis., 89 F.3d 840, demonstrates the close connection between the question presented in *C&L Enterprises, Inc., v. Citizen Potawatomi Nation*, 00-292, *supra*, and the question presented here. In *Calvello* the plaintiff was the former manager of a tribal casino who sued the tribe to enforce an arbitration award. The court found that because the contract with the manager contained an arbitration clause, but not a clause specifically reserving the tribe's sovereign immunity, that agreement to submit disputes to arbitration constituted "an unequivocal expression of the Tribe's waiver of sovereign immunity…and the Tribe's consent to confirmation of any arbitration award in federal court." 899 F.Supp. at 435-436.[39] Further, while the court found that there was not a sweeping waiver of sovereign immunity for all matters involving gaming under IRCA, "that federal courts may find a waiver of tribal sovereign immunity for the purpose of enforcing the provisions of the IRCA where prospective injunctive relief, and not *monetary relief, is sought." Id. at* 437-438. *(emphasis added)*

These Eighth Circuit district court opinions[40] all emphasize the distinction between actions against a sovereign for prospective equitable relief and those for money damages. As the Fifth Circuit noted in *Ysleta, supra*, it is a distinction that is "eminently sensible". 181 F.3d at 680. That distinction was recognized by this Court in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908), which "held that the Eleventh Amendment does not bar suit in federal court against a state official for the purpose of

---

[39] The court found the contract to be null and void, and thus the waiver of sovereign immunity in the arbitration clause to be inoperable, because it had not been approved in accordance with the IRCA.

[40] The Eighth Circuit dismissed the appeal in Calvello but took no action in the other cited cases.

obtaining an injunction against his enforcement of a state law alleged to be unconstitutional..." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156-57 n. 6, 98 S.Ct. 988, 993-94 n. 6 (1978). In *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court re-affirmed the *Ex parte* Young doctrine reversing a lower court order requiring state officials to pay out illegally held welfare benefits finding this to be indistinguishable from an award of damages against the state itself. However, expenditures by the state in order to comply with a court order for prospective relief are not barred.

As stated above, the Ninth Circuit did not directly address the nature of relief sought by Petitioners in deciding that the sovereign immunity of the Hopi Tribe barred their claim against the United States. However, by implication it ruled that the type of relief sought does not make a difference as to whether a tribe's sovereign immunity shields it from suit. The Ninth Circuit previously considered this issue. In *Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), the court ruled that while tribes are immune from suit "tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law." 924 F.2d at 901. But this exception has not been extended to provide for suit against the tribe itself when only prospective equitable relief is being sought. [41]

However, the Ninth Circuit has recognized, in analyzing the Rule 19 question as it relates to an absent tribe, the distinction between a claim for a tangible commodity and a claim seeking prospective injunctive relief. In *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990), the court ruled that absent tribes were indispensable to a suit seeking a higher quota of a salmon catch but were not necessary parties to a request for injunctive relief based on a challenge to the legality of the regulatory process which led to the establishment of the quota. *Id.* at 559.

And in *Burlington Northern, supra.*, the Ninth Circuit seemed to suggest that a suit to test the constitutionality of a statute should not be barred by tribal sovereign immunity. At issue in the case were taxes the Blackfeet Tribe was imposing on the railroad's right of way. The Ninth Circuit stated that "sovereign immunity does not extend to officials acting

---

[41] See also: *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985) (suit for declaratory and injunctive relief, as well as damages, barred by tribal immunity.)

pursuant to an allegedly unconstitutional statute." 924 F.2d at 901. It is unclear from the decision whether the court is saying that tribal officials acting in violation of federal law are not shielded from suit or whether sovereign immunity must give way to a challenge to the constitutionality of a law:

> We...conclude that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law. ... Accordingly, tribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect.
>
> *Id.* 901-902

This principle derives from *Ex parte Young, supra,* and its progeny which stand for the proposition that sovereign immunity does not shield an official from an injunction to prevent actions in violation of the Constitution. The Ninth Circuit, however, failed to acknowledge that Petitioners' claim for prospective equitable relief is to be judged differently than claims for damages when determining if sovereign immunity shields tribes and tribal officials for suit. Petitioners' claims challenge the constitutionality of a federal statute and the entire relief they ask for is prospective and equitable in nature.

The recent rulings of the Fifth, Tenth, and district courts in the Eighth Circuits in the above cited decisions seriously question the viability of a tribe's defense of sovereign immunity when measured against a claim that challenges the constitutionality of a federal statute and only seeks prospective equitable relief. The failure of the Ninth Circuit to even address this important issue in analyzing the defense of tribal sovereign immunity brings the Ninth Circuit into direct conflict with other circuits. As with the arbitration clause/tribal sovereign immunity question presented in *C&L Enterprises, Inc., supra.,* now accepted for review by this Court, the question presented in this case calls for clarification. This Court should take the opportunity to state with precision the parameters of tribal sovereign immunity in a way that will clearly answer both questions.

II. The Ninth Circuit Decided an Important Federal Question: When Can the United States Adequately Represent the Interest of an

Indian Tribe that Chooses to Absent Itself From a Lawsuit -- in a way that Conflicts with Decisions of this Court and of the Ninth Circuit Itself

In their briefs to the Ninth Circuit Petitioners and Respondents both asserted the Hopi Tribe was not a necessary party pursuant to Rule 19(a).[42] However, assuming *arguendo* that the Tribe is a necessary party, Petitioners and Respondents also agreed that the United States could adequately represent the Tribe's interests.

In various contexts this Court has determined that the United States may represent the interests of a tribe while at the same time fulfilling another congressionally mandated responsibility . In *Nevada v. United States*, 463 U.S. 110 (1983), this Court stated:

---

[42] In brief, Petitioners argument that the Hopi Tribe is not a necessary party is this: This Court has held that practical considerations, rather than a rigid formalistic approach, determine whether a case is to be dismissed under Rule 19 for failure to join a necessary party. A court must carefully examine the specific facts of a case in determining the actual likelihood of prejudice to the absent party. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733 (1968).The Ninth Circuit did not examine this case pragmatically and made its decision in the absence of factual findings on the record, relying on assumptions Petitioners had no opportunity to challenge.

The issue is whether the Hopi Tribe has a cognizable legal interest absolutely requiring joinder under a *practical-minded* application of a *discretionary* federal rule. Petitioners make no claim against the Hopi Tribe. Rather they seek to enjoin their involuntary relocation by Respondents pursuant to federal statute which Petitioners' allege violates their constitutional rights. Petitioners do not seek a to enjoin the Hopi Tribe from taking any action or a declaration that the Tribe is not the beneficial owner of the HPL. If the 1974 Settlement Act's relocation requirement is found to violate Petitioners' constitutional rights, and the federal government is enjoined from involuntarily relocating them,Petitioners would receive all the relief for which they prayed.

Unlike the situation in *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999), the sole case cited by the Ninth Circuit in dismissing Petitioners' claim, Petitioners do not challenge the Accommodation Agreement, or seek to prohibit the Hopi Tribe from fulfilling its obligations under the U.S.-Hopi Settlement Agreement, or to deprive the Tribe of the compensation it has received from the United States pursuant to the Agreement. Petitioners only challenge the constitutionality of the federal statute which prohibits the free exercise of their religion. The circuit panels' assumption that this relief would undue or damage either the Accommodation Agreement or the U.S.-Hopi Settlement Agreement is simply incorrect.

> [I]t may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well. In this regard the Government cannot follow the fastidious standards of a private fiduciary.

463 U.S. at 127-128.

Similarly, in *Arizona v. California*, 460 U.S. 605 (1983), this Court held that tribes were not relieved from the res judicata effect of a judgment merely because the government represented both the tribes and those who competed with them. The instant case does not present that more complex circumstance. Numerous federal courts have followed the above cited decisions of this Court in finding that the federal government may represent the interests of a tribe or group of Indians while at the same time representing another potentially conflicting public interest.[43]

In this case Congress, in the 1974 Relocation Act, directed the federal government to both relocate the Navajos from land partitioned to the Hopi Tribe and at the same time to protect the rights of individual Navajos, including Petitioners. The federal Respondents joined with Petitioners below in their position that the United States could adequately represent the interests of the Hopi Tribe even if the Hopi Tribe was a necessary party.[44] The panel, without analysis, evidence in the record or

---

[43] *Southwest Center, supra; Washington, supra; White Mountian Apache Tribe v. Clark*, 604 F.Supp. 185 (D.Ariz 1984); *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921 (9th Cir. 1986); *Blackfeet Indian Nation v. Hodel*, 634 F.Supp. 646 (D.Mont. 1986). [MORE CITES]

[44] The Ninth Circuit has held that: "If a legally protected interest exists, the court must further determine whether that interest will be impaired or impeded by the suit. Impairment may be minimized if the absent party is adequately represented in the suit, The United States may adequately represent an Indian Tribe unless there is a conflict of interest between the United States and the tribe." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). .

factual findings by the District Court rejected the parties' joint position that there is no conflict between the United States and the Hopi Tribe for two reasons. First, because panel believed that the United States took a different position in the district court.[45] Second, the panel assumed that because the United States is trustee for the Hopi Tribe and for the individual Indian Petitioners it could not represent the Tribe's interest because-it "would stand on both sides of the question." But the panel failed to explain how a conflict might actually occur within the context of this lawsuit. Previously, the Ninth Circuit has criticized district courts that determined, without analysis of the specific interests at stake, that the United States could not represent the interests of absent tribes:

> The district court also *suggested, without elaboration or explanation,* the possibility of conflict arising from the federal government's potentially inconsistent responsibilities under its trust obligations and the applicable environmental laws. Neither the district court nor any of the parties *has explained how such a conflict might actually arise in the context of Southwest's suit.* They identify no argument the United States would not or could not make on the Community's behalf, and suggest no "necessary element" the Community alone could present.

Southwest Center for Biological Diversity v. Babbitt, 150 F.3d 1152, 1153-1154 (9th Cir. 1998); *Washington v. Daley*, 173 F.3d 1159, 1168 (9th Cir. 1999).(emphasis added)

Identical to the conclusion of the district courts in *Southwest Center* and *Washington*, reversed by the Ninth Circuit, the panel here assumed a *potential* conflict between the Hopi Tribe and the United States without analyzing the question or providing an example of how such a conflict might actually arise in the context of this lawsuit.[46] Indeed, the

---

[45] In their original appellate brief Defendants did assert that the Tribe was indispensable because it is the beneficial owner of the land in question. However, Defendants did not address the adequacy of representation issue

[46] The panel ignored prior Ninth Circuit decisions applying a three-part test to determine if an existing party to a lawsuit can adequately represent an absent one, and finding a non-party adequately represented if: (1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect. *Southwest Center,*

Tribe itself was unable to identify a single specific argument the United States had not or would not make on its behalf, other than that "the federal defendants are unwilling to assert the Tribe's argument that it is an indispensable party to this litigation." (Second Supplemental Brief of Hopi Tribe at 5). Previously, the Ninth Circuit explicitly rejected this as a reason for finding that the absent party was not adequately represented, characterizing such an approach as "circular." *Southwest Center, supra,* 150 F.3d at 1154.

The trust interests of only one tribe, the Hopi, are present in this action. Petitioners are Navajo Indians but, as the panel's opinion recognizes, the instant lawsuit implicates no "interests of the Navajo Nation itself." Petitioners are asserting individual constitutional rights. As the federal Respondents noted: "[B]ecause the claims the individuals assert concern their individual constitutional rights, not trust obligations relating to a *res*, the federal government does not face divided trust obligations between the Plaintiffs and the absent Hopi Tribe." (Sup. Brief of the Federal Appellees on the Indispensable Party Issue at 11-14) Before Petitioners' First and Fourteenth Amendment claims are dismissed the specific nature and extent of the trust duties present in this case is deserving of a detailed examination and analysis which the Ninth Circuit failed to provide.

The circuit court panel finds a conflict, between the general trust responsibility owed to the Hopi Tribe and the federal government's duty to protect the rights and property of those Navajo individuals who are awaiting relocation, so great that it requires dismissal of Petitioners' lawsuit. But neither the panel or the Hopi Tribe has identified how such a conflict might actually arise in the context of this lawsuit.

Despite the fact that the United States agrees with Petitioners that it can adequately represent the Tribe, and the Tribe itself can identify no concrete example of how a conflict might actually arise within the context of this case (except for differing positions on the Rule 19 question itself), the panel, without evidence or factual findings, presumes a conflict exists. The United States' trust relationship is meant to benefit Indians yet the

---

supra, 1153 - 1154; *Washington, supra,* 1167; *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980); *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir 1992).

cruel irony is that Petitioners are denied their only opportunity for adjudication of their First and Fourteenth Amendment claims solely because they are "beneficiaries" of Respondents' trust responsibility.

In this case the United States is not called upon to represent diverging trust interests. As a matter of law, the United States is capable of representing the absent Hopi Tribe in this case.

III. The Hopi Tribe Through Its Actions and Conduct Has Waived its Sovereign Immunity or Should be Estopped from Using its Immunity to Deny Petitioners Access to the Only Forum Available to Them to Test the Constitutionality of the 1974 Relocation Act

Even if the Hopi Tribe has an interest recognized under Rule 19(a)(2) this does not require that the Tribe must be joined. [47] Lawsuits in which individuals aver that Congress has acted in violation of their constitutional rights have been permitted by this Court to proceed in the absence of interested tribes.[48] Furthermore, the unique facts of this case raise serious questions as to whether the Hopi Tribe should be estopped from asserting that it is an indispensable party.

The Hopi Tribe entered its appearance as amicus as soon as the lawsuit was filed in 1988. It has since actively participated at each stage of the litigation and related settlement negotiations. When the United States Court of Appeals for the Ninth Circuit ordered this case into mediation the Hopi Tribe accepted the Court's invitation to participate and was included as a full participant at all stages of the mediation.

More importantly, through the *Manybeads* mediation the Hopi Tribe itself negotiated, drafted and signed two separate settlement agreements, the Accommodation Agreement and the U.S.-Hopi Settlement

---

[47] "[T]he fact that a tribe has an interest in the litigation is ot enough in itself to make it a necessary party in the sense of Rule 19." *Thomas v. United States*, 189 F.3d 662, 668 (7th Cir. 1999). See also *Washington, supra.*, at 1167-69; *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C.Cir. 1986).

[48] See, e.g. *Babbitt v. Youpee*, 519 U.S. 234 (1997) (constitutional challenge by individual Indians that statute, Indian Land Consolidation Act, providing that certain interests in allotted lands should escheat to tribe upon owner's death constituted a "taking"); *Hodel v. Irving*, 481 U.S. 704 (1987) (constitutional challenge to earlier Indian Land Consolidation Act).

Agreement, partially settled the *Manybeads* case while providing the Hopi Tribe with significant monetary benefits not otherwise available to it.[49]

It has been held that a tribe's waiver of sovereign immunity must be made explicitly and that appearing in a lawsuit as amicus does not constitute such a waiver. But here the Hopi Tribe's participation went far beyond simply providing the court with its positions through memoranda. It actively involved itself as a full participant in both the litigation and mediation process.

The Hopi Tribe also induced the Navajos to accept Hopi Accommodation Agreements with its promise that those individuals who signed the Accommodation Agreement could still pursue the merits of their appeal in federal court. The District Court endorsed the Tribe's offer, terming it a "win, win" situation. Petitioners and a significant majority of the other HPL Navajos relied on the Tribe's representations and the District Court's endorsement in weighing their decision to sign the AA. Petitioners were led by the Hopi Tribe to believe that signing the AA would not foreclose their opportunity to have their constitutional claims heard by the federal courts. Had Petitioners known that the Tribe would

---

[49] The Settlement Agreement and the 1996 Act provide that funds be paid out in the following manner: (1) the Hopi Tribe will receive $2.4 million once the Tribe files a motion to dismiss its appeal in the Ninth Circuit in *Secakuku v. Hale*; (2) the Hopi Tribe will receive $22.7 million once legislation extending the Tribe's leasing authority to 75 years has been enacted and once the Tribe's claims in the Court of Federal Claims for damages due to any Federal action which occurred before 1982 are dismissed; (3) the Hopi Tribe will receive $10 million once 65% of the Navajo families residing on the Hopi reservation have signed an Accommodation Agreement or have chosen to relocate and once the Hopi Tribe's claims in the Court of Federal Claims for livestock trespass damages against the United States from 1983 through 1988 are dismissed; (4) the Hopi Tribe will receive $15.1 million once 75% of the Navajo families residing on the Hopi reservation have signed an Accommodation Agreement or have chosen to relocate and once the Hopi Tribe's claims in the Court of Federal Claims for livestock trespass damages against the United States from 1989 through and including 1996 are dismissed; and (5) once 85% of the Navajo families residing on the Hopi reservation have signed an Accommodation Agreement or have chosen to relocate, the Secretary shall take into trust for the Hopi Tribe up to 500,000 acres of rural lands in northern Arizona, consistent with the terms of the Settlement Agreement and the 1996 Settlement Act. See S. Rep. 104-363, 104th Cong. 2d Sess. at 35-47 (1996); See also Supplemental Brief of Federal Appellees at p. 3-6.

receive the benefits of its inducement and then continue to claim immunity from suit in order to force a dismissal of Petitioners' lawsuit, they surely would not have signed the Hopis' Agreements.

As a matter of federal law, an Indian tribe is subject to suit where it has waived sovereign immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed. 2d 981 (1998). The Accommodation and Settlement Agreements negotiated in the *Manybeads* mediation were prepared and proposed by the Hopi Tribe. The Settlement Agreement incorporated the Accommodation Agreement and included an enforcement provision which clearly waived the Tribe's immunity from suit for purposes of enforcing the provisions of the agreement.

> The United States and the Tribe hereby agree that the provisions of this Settlement Agreement shall be enforceable in either the United States Court of Federal Claims in Washington, D.C., or in the United States District Court in Phoenix, Arizona, as appropriate. Settlement Agreement at p. 21 paragraph 10.

This language is very similar to the language in the arbitration agreement at issue in *C & L Enterprises, Inc. v. Citizen Potawatomi Nation*, 00-292, granted certiorari on October 30, 2000. Petitioners in that case argue that such language constitutes a waiver of tribal sovereign immunity, a position that has been accepted by the Seventh and Eight Circuit Courts of Appeal as well as the Arizona and Alaska Supreme Courts.

Under these circumstances the decision of the Ninth Circuit results in the inequity of permitting the Hopi Tribe to obtain the substantial benefits of its offer, and then once Petitioners accept, and then using its sovereign immunity as a sword to deny Petitioners access to the only forum available for adjudication of their constitutional claims.

While recognizing Petitioners will have no alternative forum for their constitutional claims if the action is dismissed for nonjoinder, the Ninth Circuit finds this factor outweighed because, it speculates that if the case goes forward and Petitioners prevail, the Tribe "will suffer substantially..." This decision conflicts with an earlier decision the of Ninth Circuit which recognized:

> [W]hether a judgment rendered in the person's absence will be adequate and whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder ... [are] ... the most relevant factors proposed by Rule 19(b)... [and the] ... most weighty in the circumstances of the case at bar.
>
> *Anrig v. Ringsby United,* 603 F.2d 1319, 1326 (9th Cir. 1978)

In *Prescription Plan Service Corp. v. Frances*, 552 F.2d 493 (2d Cir. 1977), the Second Circuit similarly reversed a lower court dismissal for lack of diversity jurisdiction on a finding that two parties were indispensable in a contract action. The circuit court reversed, stating that appellant had no satisfactory alternative in state court to bring his action. Indeed, the court held that even the possibility of a state forum was insufficient to cause dismissal as no evidence was presented that the same action could be brought against the same parties in state court. *Id.* at 497. Petitioners have no alternative forum to bring their constitutional claim should this Court not correct the Ninth Circuit's erroneous decision that the Hopi Tribe is indispensable to this litigation.

The only forum available to Petitioners to vindicate individual constitutional claims against the United States, as opposed to tribal interests, is the federal courts. The Hopi Tribe seeks to participate in and receive all the benefits of the litigation, mediation and legislative processes while at the same time, voluntarily absenting itself as a party and using its claimed immunity to deprive Petitioners' of their fundamental due process right to challenge the constitutionality of a federal statute which requires their involuntary relocation from their sacred homelands.

Under these circumstances the decision of the Ninth Circuit results in the inequity of permitting the Hopi Tribe to obtain the substantial benefits of its offer, and then once Petitioners accept, using sovereign immunity as a sword to deny Petitioners access to the only forum available for adjudication of their constitutional claims.

CONCLUSION

The above stated reasons Petitioners pray this Court accept grant their petition and agree to review these important issues.

Dated this 28th day of November, 2000.

TREBON & FINE, P.C.
JOHN TREBON
Attorney for Petitioners

No. _____

In The

Supreme Court of the United States

October Term, 2000

JENNY MANYBEADS, et al.
Petitioners,

v.

UNITED STATES OF AMERICAL, et al.
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

(1) Decision of the United States Court of Appeals for the Ninth Circuit, dated April 18, 2000, published at 209 F.3d 1164 (2000).....1a

(2) Decision of the United States District Court for the District of Arizona, dated October 20, 1989 published at 730 F.Supp 1515 (1989)..5a

(3) Order of the United States Court of Appeals for the Ninth Circuit, dated July 31, 2000.....16a

(4) Order of the United States Court of Appeals for the Ninth Circuit, dated May 10, 1991.....17a

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUT

Jenny MANYBEADS, Yellowwoman Yazzie, Ashkie Bitsi, Irene Yazzie, Blanche Wilson, Waldine Yazzie, Dan R. Yazzie, Bessie Begay, Mae Wilson Tso, Askie Tso, Earl Tso, Sam W. Tso, Betty A. Tso, Fiona Tso, Joe Benally, Violet Ashkie, Louise Benally, Plaintiffs-Appellants,

v.

UNITED STATES of America, Donald P. Hodel, in his official capacity as Secretary of the Department of Interior, United States Department of the Interior, United States Bureau of Indian Affairs, et al., Defendants-Appellees.

No. 90-15003.

4/18/00

Members of Navajo Nation residing on land belonging to Hopi Tribe brought action against United States alleging that Navajo and Hopi Indian Land Settlement Act of 1974 violated their First Amendment right to freely exercise their religion. The United States District Court for the District of Arizona, Earl H. Carroll, J., 730 F.Supp. 1515, dismissed action, and members appealed. After Hopi Tribe and United States reached Settlement Agreement entitling Hopi Tribe to compensation, and after Hopi Tribe, Navajo Nation, and representatives of individual Navajos reached Accommodation Agreement limiting rights of Navajos residing on Hopi land, the Court of Appeals, Noonan, Circuit Judge, held that: (1) Tribe was necessary party, and (2) Tribe was indispensable party.

Affirmed.

Lee Phillips, Flagstaff, Arizona, for the plaintiffs-appellants.

Katherine Hazard, United States Department of Justice, Washington, D.C., for the defendants-appellees.

Tim Atkeson, Arnold & Porter, Denver, Colorado, for the amicus Hopi Tribe.

Appeal from the United States District Court for the District of Arizona; Earl H. Carroll, District Judge, Presiding. D.C. No. CV-88-0410-PCT-EHC.

Before: PREGERSON, NOONAN and THOMPSON, Circuit Judges.

NOONAN, Circuit Judge:

Jenny Manybeads et al., (Manybeads) appeal the dismissal by the district court of their suit against the United States. We affirm the dismissal for want of a necessary and indispensable party, the Hopi Tribe.

PROCEEDINGS

The past history of this litigation has recently been set out in Clinton v. Babbitt, 180 F.3d 1081 (9th Cir.1999). We need not repeat what we said there. Suffice to say that Manybeads challenged the constitutionality of 25 U.S.C.§ 640d et seq. (1994), contending that it violated the Free Exercise rights of the plaintiffs. The district court dismissed the complaint for failure to state a claim. On appeal, we arranged for mediation. A Settlement Agreement was reached between the Hopi Tribe and the United States and an Accommodation Agreement agreed to by the Hopi Tribe, the Navajo Nation, and representatives of individual Navajos. By this agreement, provision was made for plaintiffs here and
other Navajo families residing on Hopi land to obtain at no cost 75 year leases on homesites and farmlands within land awarded by court decree to the Hopi.

The Manybeads plaintiffs remaining in this case are dissatisfied with the Accommodation Agreement and press their contention that they are being denied religious freedom.

In the district court and now before us the Hopi Tribe argued that it is a necessary and indispensable party and that, as it has not waived its sovereign immunity and is not a party, the suit should be dismissed.

ANALYSIS

Fed. R. Civ. Proc. 19(a)(1) provides that a party is necessary if, in its absence, complete relief cannot be accorded those already parties. The Hopi Tribe is a necessary party here. Manybeads cannot be afforded complete relief without undoing the Accommodation Agreement, which limits the rights of Navajos on Hopi land, and without undoing the Settlement Agreement by which the Hopi Tribe is entitled to compensation for what is conceded to the Navajos.

The Hopi Tribe is also a necessary party in terms of Fed. R. Civ. Proc. 19(a)(2): it "claims an interest relating to the subject of the action and is so situated that the disposition of the action may (1) as a practical matter impair or impede" its ability to protect that interest. As we have held in Clinton, 180 F.3d at 1089, the Hopi Tribe qualifies as a necessary party under both parts of Rule 19(a).

[2] The Hopi Tribe is also indispensable as Rule 19(b) defines indispensability. A judgment in Manybeads' favor would upset two agreements, long and carefully worked out, by which a balance was struck between the interests of the Navajo Nation and the Hopi Tribe, peaceful relations between the two Indian sovereigns was secured, and substantial monetary compensation was obtained and is to be obtained by the Hopi Tribe. Manybeads argues that she is not attacking the two Agreements, only the 1974 statute that led to them. The practical effect, however, of what she seeks in having the 1974 statute invalidated would be the undoing of the Agreements to the substantial prejudice of the Hopi Tribe. No remedy or relief would lessen the prejudice. No judgment in the Hopi Tribe's absence will be adequate. Clinton, 180 F.3d at 1090.

One factor favors Manybeads. If the action is dismissed for nonjoinder, her Free Exercise claim will go unredressed. This factor is not a light one. Congress, the First Amendment proclaims, "shall make no law ... prohibiting the free exercise [of religion]." This freedom--the first freedom enshrined in the Bill of Rights--is fundamental in our structure of government. It is a freedom that has sometimes been successfully asserted against invasion by school boards, municipalities, and states. It has never been upheld by the Supreme Court when asserted against Congress. In principle there is no reason why it should not prevail against congressional intrusion. But this principle cannot be asserted when a sovereign, not a party to the case, will suffer substantially from its vindication.

The United States contends that it can adequately represent the Hopi Tribe, and that there is no need to join the missing sovereign. The contention is weak because it is the reverse of what the government contended in the district court. The contention is contradicted because the government is a trustee not only for the Hopi Tribe and the Navajo Nation but for the very plaintiffs in this case. By the explicit terms of 25 U.S.C. § 640d-9(c) and (d), the government must protect the property and personal rights of the individual Navajos subject to relocation. The government, if it undertook to act for the Hopi Tribe, would stand on both sides of the question. The government cannot represent the tribe. In so concluding, we do not suggest that it is the United States' trust responsibility to the Navajo Nation that creates a conflict of interest preventing the United

States from adequately representing the Hopi Tribe. There is no such conflict of interest because the Navajo Nation is not a party to this suit. This suit implicates only the interests of individual plaintiffs who are members of the Navajo Nation, and not the interests of the Navajo Nation itself.

A necessary and indispensable party is missing. The judgment of dismissal is AFFIRMED.

United States District Court for the District of Arizona

Jenny MANYBEADS, et al., Plaintiffs,
v.
UNITED STATES of America, et al., Defendants.

Civ. No. 88-410.

10/20/89

Navajo tribal members subject to relocation from Hopi Indian Reservation under authority of Navajo-Hopi Land Settlement Act challenged such action on various statutory and constitutional grounds. On parties' motions, the District Court, Carroll, J., held that: (1) Act did not violate tribal members' right to free exercise of religion; (2) relocation of tribal members did not violate their equal protection rights; (3) Act and its implementing programs did not reflect federal abdication of trust responsibilities vis-a-vis Indian religious right; and (4) relocation of tribal members under authority of Act would not violate international law.

Dismissed.

Lee Brooke Phillips, Matt Strassberg, Big Mountain Legal Office, Flagstaff, Ariz., Terry Gross, Rabinoitz, Boudin, Standard, Krinsky & Lieberman, New York City, Bruce Ellison, Rapid City, S.D., for plaintiffs.

Richard S. Alleman, U.S. Atty., Phoenix, Ariz., Steven Carroll, U.S. Dept. of Justice, Land & Natural Resources Div. Indian Resources Section, Washington D.C., for defendants.

OPINION AND ORDER DENYING PRELIMINARY INJUNCTION AND DISMISSING ACTION

CARROLL, District Judge.

Plaintiffs (47 in number) are Navajo Tribal members residing on that part of the Hopi Indian Reservation identified as Hopi Partitioned Lands (HPL) and subject to relocation from that reservation pursuant to the provisions of the Navajo-Hopi Land Settlement Act, 25 U.S.C. § 640d et seq., Pub.L. 93-531, Dec. 22, 1974, 88 Stat. 1712, and as subsequently amended. (FN1)

Defendants are the United States of America, Donald P. Hodel, in his official capacity as Secretary of the Department of Interior, United

States Department of the Interior, Ross O. Swimmer, in his official capacity as Assistant Secretary of the Department of the Interior, United States Bureau of Indian Affairs, Hawley Atkinson, in his official capacity as Chairman of the Navajo-Hopi Indian Relocation Commission and the Navajo-Hopi Indian Relocation Commission.

Plaintiffs assert seven reasons (claims) why they, and other Navajo Tribal members residing on the Hopi Reservation and with similar religious beliefs and practices, have the right for themselves and their heirs in perpetuity, to reside on the Hopi Reservation on what they consider their extensive customary use areas, with unlimited grazing privileges, the right to construct such buildings as they wish, and to utilize unlimited water claimed necessary to their needs:

First Claim --Violation of Right to Free Exercise of Religion;

Second Claim --Violation of the American Indian Religious Freedom Act;

Third Claim --Violation of Equal Protection;

Fourth Claim --Violation of Federal Trust Responsibility;

Fifth Claim --Violation of Right to Freedom of Religion under Customary International Law and the United Nations Charter;

Sixth Claim --Violation of International Prohibition Against Genocide;

Seventh Claim --Violation of Plaintiffs' Rights Under Article 73 of the United Nations Charter as a Non-Self-Governing People.

Plaintiffs seek a declaratory judgment establishing each of these claims, as well as injunctive relief:

Preliminarily and permanently enjoining defendants from relocating plaintiffs, from interfering with structures essential to plaintiffs' religious practices, from threatening or harassing plaintiffs, from disrupting plaintiffs' water supply, from interfering with plaintiffs' livestock and housing, from engaging in behavior or activities which coerce plaintiffs to leave their ancestral homelands, and from engaging in or authorizing programs or other actions which deprive plaintiffs of the livestock and housing necessary to sustain themselves on their ancestral homelands.

Defendants filed a Motion to Dismiss which has been fully briefed and is pending decision by this Court.

Plaintiffs' Application for a preliminary injunction was heard October 4, 5, 6 and 7, 1988. The evidence presented in Attakai v. United States, CIV 88-964 PCT EHC, has been incorporated in this proceeding. The parties have each filed proposed findings of fact and conclusions of law and post hearing briefs.

The motions to dismiss and for a preliminary injunction involve common issues and accordingly this Order will address both motions. For the reasons set forth in this Order, the Motion for a Preliminary Injunction will be denied and defendants' Motion to Dismiss will be granted.

1. Plaintiffs Have No First Amendment Claims

[1] The Free Exercise Clause of the First Amendment is the putative basis for plaintiffs' claims that the Navajo-Hopi Relocation Act is unconstitutional and that they have the right to remain in perpetuity on property held in trust by the United States for the exclusive use of the Hopi Tribe. If there was ever any basis for asserting such contentions (see Bowen v. Roy, 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986)) they were put to rest by the United States Supreme Court in Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). Lyng provides direct and dispositive answers to the plaintiffs' First Amendment claims. The holdings of Lyng are the law of this country--whether or not personally acceptable to plaintiffs or those who espouse their cause.

The principal issue in Lyng was whether the Free Exercise Clause prevented the government from constructing a road through a portion of a National Park "that has traditionally been used for religious purposes by members of three American Indian Tribes." In concluding that the Free Exercise Clause neither restrained the government in such instance nor required it to demonstrate a compelling need to use its property for building a road in the manner contemplated, the Court held, in substance:

A court cannot weigh the adverse affects of a program on one religion and compare them with the adverse effects of some other program on a different religion;

The fact that a person's ability to practice their religion will be virtually destroyed by a governmental program does not allow them to impose a religious servitude on the property of the government [much less

property which the government holds in trust for another sovereign Indian tribe];

The nature of the religious rights claimed cannot create a de facto beneficial ownership of public (or private) property, in order to practice ones religion.

However much plaintiffs, or those with similar interests may desire to permanently reside where they now do, i.e., on lands partitioned to the Hopi Tribe, that option is
not available to them. (FN2) To hold otherwise would afford plaintiffs rights, benefits and privileges not enjoyed by other citizens. The rights claimed by plaintiffs in Hopi lands are in total derogation of Hopi rights in and to their reservation.

The Navajo-Hopi Land Settlement Act and the many cases decided with respect to that Act are not unconstitutional. Neither the Act itself nor court cases construing the Act prohibit the free exercise of religion by any of the plaintiffs. As held in Lyng:

Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will 'virtually destroy the Indians' ability to practice their religion,' [North West Indian Cemetery Protective Association v. Peterson] 795 F.2d [688] at 693 [(9th Cir.1986)] (opinion below), the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities--from social welfare programs to foreign aid to conservation projects--will always be considered essential to the spiritual wellbeing of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent it is feasible, is for the legislatures and other institutions.

108 S.Ct. at 1326.

As referenced in footnote 2, Congress provided in 25 U.S.C. § 640d-5(c) that:

In any division of the surface rights to the joint use area, reasonable provision shall be made for the use of and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe when such use and access are for religious purposes.

It is significant that neither tribe has claimed that this requirement was ignored in the partition process. Following partition, each tribe filed (under seal) a designation of their religious shrines. The Court has not been requested by either tribe to enter any further order directed to this statutory provision.

Section 640d-20 addresses these same religious concerns following partition:

Notwithstanding anything contained in this subchapter to the contrary, the Secretary shall make reasonable provision for the use of and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe where such use and access are for religious purposes.

Again, these rights may not satisfy plaintiffs--but, suffice it to say--they far exceed rights of access afforded to any other religious group in this country. These rights are enforceable; however, they do not divest the government (or a property owner) "of its right to use what is, after all, its land." Lyng, 108 S.Ct. at 1327.

2. There is No Violation of the American Indian Religious Freedom Act (AIRFA)

Lyng also addressed and rejected contentions similar to those asserted by plaintiffs in their second claim for relief, i.e., that their interpretation of the First Amendment was enacted into statutory law. The Court noted: "Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights." Id., at 1378.

3. Equal Protection Claim is Meritless

Plaintiffs claim that their rights have been violated because in other instances (citing the Pueblo Lands Act of 1924 and the Alaska

Native Claims Settlement Act of 1971) white settlers were allowed to remain on public lands and the Indian claimants were given monetary compensation. This argument is disingenuous here where the joint property owners were two Indian Tribes.

The essential issue whether to partition the lands in kind or to give more lands to one tribe and give greater monetary compensation to the tribe receiving the unequal (lesser) land area was in the first instance, a political decision. Congress specifically directed (25 U.S.C. § 640d-5(d)):

(d) In any partition of the surface rights to the joint use area, the lands shall, insofar as is practicable, be equal in acreage and quality: Provided, That if such partition results in a lesser amount of acreage, or value, or both to one tribe such differential shall be fully and finally compensable to such tribe by the other tribe. The value of the land for the purposes of this subsection shall be based on not less than its value with improvements and its grazing capacity fully restored: Provided further, That, in the determination of compensation for any such differential, the Federal Government shall pay any difference between the value of the particular land involved in its existing state and the value of such land in a fully restored state which results from damage to the land which the District Court finds attributable to a failure of the Federal Government to provide protection where such protection is or was required by law or by the demands of the trust relationship.

The Mediator and later the District Court partitioned the lands "on the basis of fairness and equity" (25 U.S.C. § 640d-7(b)). In this process, the district court considered other alternatives, including compensation, to partition. The Ninth Circuit agreed with the district court's decision that partition was "the only practicable solution":

We affirm the decision to partition the Joint Use Area. That resolution was recommended by the mediator, envisaged by Congress, and has long been seen as the most likely means of fully effectuating the legal rights of the Hopi and resolving this controversy.

Sekaquaptewa v. MacDonald, 575 F.2d 239, 245 (9th Cir.1978). This determination is res judicata and is not subject to collateral attack by the individual tribal members. See also 25 U.S.C. § 640d-7(a). In point of fact, this was a tribal claim that was never available to individual tribal members to assert in their own names. Plaintiffs have not been denied equal protection of the laws and their due process rights have not been violated.

4. Federal Trust Responsibilities Not Violated

Plaintiffs assert (Complaint p. 54) that the "United States and its officials, including all defendants herein, are required to protect and preserve the religious rights of plaintiffs" and that:

136. The proposed conduct and actions of defendants to relocate plaintiffs from their ancestral home and medicine lands will constitute a violation of this trust relationship.

This is in the main but a rescript of plaintiffs' earlier First Amendment issues. This claim serves no purpose, apart from affording plaintiffs an opportunity in their complaint to allege a number of argumentative propositions--irrelevant to the issues at hand--having to do with plaintiffs' perceptions
as to enactment of the Relocation Act and inferring that prior to that Act the Hopis and Navajos co-existed peacefully on what had been the joint use area. (Complaint, pp. 44-47). Without extending this discussion, a reading of Healing v. Jones, 174 F.Supp. 211 (D.Ariz.1959), and Healing v. Jones, 210 F.Supp. 125 (D.Ariz.1962), aff'd, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963), will be instructive to those interested in how these inter-tribal problems developed post-1882. As noted in Hamilton v. MacDonald, 503 F.2d 1138, 1146 (9th Cir.1974), problems between the tribes continued unabated after Healing, culminating in Congress authorizing partition of the joint use areas by the 1974 legislation: (FN3)

The district court determined that the Hopi had been ousted, and that finding is not clearly erroneous--indeed, it is more than amply supported by the evidence. A careful review of the record reveals that the Hopi Tribe made demands for use of its joint interest to both the government and the Navajo Tribe, but that it has been excluded wrongfully from any but an insubstantial use of the joint use area by the acts of members and officials of appellant [Navajo] Tribe and of government officials.

The Government has a trust obligation to both tribes. It failed to fairly act to protect the Hopi rights for many, many years. Congress and the Courts--at Congress' direction--were ultimately required to resolve the disputes between these two tribes.

The Navajo-Hopi Land Settlement Act was enacted after extended Congressional hearings and has been amended to address particular programs or concerns of the involved tribes. Many members of the Navajo Tribe have relocated from the Hopi lands after partition pursuant to the Act, as have most of the relatively few Hopi families living on the

lands partitioned for exclusive use of the Navajo Tribe. Programs are in place to provide counselling to persons who must relocate and to advise those persons about their rights as relocatees. These assistance and advisory programs do not violate the constitutional rights of the relocatees. On some occasions, an employee of a government agency may have done something that offended one of the relocatees or members of their family, either with respect to the time or place of the meeting, or information concerning relocation procedures. There is nothing to suggest that these discussions were coercive in character or purpose, or that they require supervision by the Court. Relocation, with one exception FN4)--under the Navajo-Hopi Land Settlement Act is not now, and it has never been--a voluntary undertaking by members of the Hopi Tribe residing on lands partitioned to the Navajo tribe, or by members of the Navajo Tribe residing on lands partitioned to the Hopi Tribe. In the event a person (family) subject to relocation does not participate in and complete relocation, he or she is subject to relocation (eviction) when a "new or replacement home" is provided for their household. See 99 Stat. 1257; 100 Stat. 1783-278.

5. International Law and United Nations Charter claims are legally frivolous

Claims Fifth, Sixth and Seventh are, to adopt a phrase used by another court, "far
fetched." (FN5)

International law in general is relevant only where there is no treaty and no controlling executive or legislative act or judicial decision. Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.1986), cert. denied, Ferrer-Mazorra v. Meese, 479 U.S. 889, 107 S.Ct. 289, 93 L.Ed.2d 263 (1986).

The United Nations Charter is not a "self-executing international obligation of the United States." Spiess v. Itoh & Co. (America), Inc., 643 F.2d 353, 363 (5th Cir.1981); Restatement of the Law (Third), The Foreign Relations Law of The United States, § 701, p. 156. The Navajo-Hopi Land Settlement Act was enacted in the interest of this nation. It is not overridden by the United Nations Charter.

More directly, the Navajo-Hopi Settlement Act and programs implementing that Act do not violate plaintiffs' rights under customary international law or the United Nations Charter. Recognizing the difficult problems to be resolved between the interests of the two tribes to lands that each had the right to co-equal use prior to partition, Congress acted to protect the interests of both tribes. Relocation benefits, if not acceptable to

these plaintiffs, would be the envy of countless millions in other countries. The Court's remarks in Hamilton, 503 F.2d at 1145, are as true today as they were when written in 1974:

This is poor men against other poor men, fighting against a long historical backdrop for an over-grazed, harsh, and inhospitable area which yields little above a subsistence living. Both tribes have historical claims to the area, and both undoubtedly have present economic need. Any solution is inevitably bound to cause suffering. The Order of Compliance and implementation plans attempt to minimize the economic dislocation caused the Navajo sheepherders, but the district court obviously cannot at the same time implement the decree protecting Hopi interests and not visit hardships on the Navajo, who presently use the entire area. Were the issues res nova, we could not say that the equal division struck was an abuse of discretion.

The United States Senate ratified the Genocide Convention in 1987, with three understandings and one declaration. The "Genocide Convention Implementation Act of 1987 (The Proxmire Act)" appears in the Criminal Code as 18 U.S.C. § 1091, et seq. Only the most partisan of advocates would argue that the Navajo-Hopi Land Settlement Act or subsequent amendments violate in word or spirit the Genocide Implementation Act of 1987:

(a) Basic offense.--Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such--

(1) kills members of that group;

(2) causes serious bodily injury to members of that group;

(3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture or similar techniques;

(4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;

(5) imposes measures intended to prevent births within the group; or

(6) transfers by force children of the group to another group; or attempts do so, shall be punished as provided in subsection (b).

If the Act was otherwise applicable--which it is not --section 1092 provides that nothing in the Act should "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding."

CONCLUSION

The Court finds that plaintiffs have failed to establish either the likelihood of eventual success on the merits as to any of their claims, or that serious questions are raised and the balance of hardships tips sharply in their favor. See Johnson Controls, Inc. v. Phoenix Control Systems, Inc., 886 F.2d 1173, 1174 (9th Cir.1989). In this instance, the public interest would not be advanced by granting of what would be an improvident preliminary injunction.

ACCORDINGLY,

IT IS ORDERED denying plaintiffs' Motion for Preliminary Injunction.

IT IS FURTHER ORDERED granting defendants' Motion to Dismiss.

IT IS FURTHER ORDERED that Judgment be entered that plaintiffs take nothing by reason of their complaint.

(FN1.) This action was originally filed January 26, 1988 in the United States District Court for the District of Columbia. The case was transferred to this district on defendants' motion. Judge Gesell concluded at pg. 5 of the transfer order, "That there are therefore, strong policy reasons to have all aspects of the Hopi-Navajo controversy coordinated and resolved in a single federal district. Congress has recognized this through the statutory scheme it enacted and the dictates of judicial economy and common sense so require."

(FN2.) Here there are compelling reasons to partition the land and to conclude the relocation process. Many Navajo families have relocated; range restoration and livestock reduction projects have been implemented; lands have been purchased and made a part of the Navajo Reservation to accommodate relocatees; substantial amounts have been appropriated and expended during the period 1958 to date for all of these purposes. Importantly, the completion of the relocation will encourage all interested parties to go on with their lives and make necessary adjustments to their

new environments. An important result will be that the Hopi Tribe will finally attain exclusive jurisdiction over their entire reservation, to use, manage and control, subject of course to the privileges which enure to the Navajo Tribe, and to its members, pursuant to 25 U.S.C. § 640d-20; 640d-5(c) (right of members of each tribe to use and access to identified religious shrines on the reservation of the other tribe).

(FN3.) See also: Hamilton v. Nakai, 453 F.2d 152 (9th Cir.1971),cert. denied, 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332 (1972); United States v. Kabinto, 456 F.2d 1087 (9th Cir.1972); Sekaquaptewa v. MacDonald, 544 F.2d 396 (9th Cir.1976), cert. denied, 430 U.S. 931, 97 S.Ct. 1550, 51 L.Ed.2d 774 (1977); Sekaquaptewa v. MacDonald, 575 F.2d 239 (9th Cir.1978); Sekaquaptewa v. MacDonald, 626 F.2d 113 (9th Cir.1980); Sidney v. MacDonald, 536 F.Supp. 420 (D.Ariz.1982), aff'd, Sidney v. Zah, 718 F.2d 1453 (9th Cir.1983); Hopi Tribe v. Watt, 530 F.Supp. 1217 (D.Ariz.1982), aff'd 719 F.2d 314 (9th Cir.1983). See also Sekaquaptewa v. MacDonald, 448 F.Supp. 1183 (D.Ariz.1978); Sekaquaptewa v. MacDonald, 619 F.2d 801 (9th Cir.1980); and Sekaquaptewa v. MacDonald, 591 F.2d 1289 (9th Cir.1979) for cases involving the dispute between the tribes over lands on an adjoining Reservation.

(FN4.) The Relocation Act (25 U.S.C. § 640d-28) provides that eligible persons may apply for life estate leases, allowing them to remain on the reservation of the other tribe until one of two determinable events occur.

(FN5.) United States of America v. Komisaruk, 885 F.2d 490 (9th Cir.1989).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Jenny Manybeads, et al., Plaintiffs-Appellants,

v.

United States of America, et al., Defendants-Appellees

DC No. CV-88-0410-PCT-EHC

7/31/00

Before: PREGERSON, NOONAN, and THOMPSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Pregerson has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Jenny Manybeads, Yellowwoman Yazzie; Ashkie Bitsi; Irene Yazzie; Blanche Wilson; Waldine Yazzie; Dan R. Yazzie; Bessie Begay; Mae Wilson Tso; Askie Tso; Earl Tso; Sam W. Tso; Betty A. Tso; Fiona Tso; Joe Benally; Biolet Ashkie; et al., Plaintiffs-Appellants,

v.

United States of America; Donald P. Hodel, in his official capacity as Secretary of the Interior; United States Department of the Interior; United States Bureau of Indian Affairs, et al., Defendants-Appellees

DC No. CV-88-0410-PCT-EH

5/10/91

Before: PREGERSON, NOONAN and THOMPSON, Circuit Judges.

This case was argued in San Francisco, California on April 10, 1991. In its consideration of this case, the panel believes that the best interests of the parties would be served if the case were settled. The panel is also of the view that with the assistance of an experienced settlement mediator, there is a reasonable possibility that a settlement, satisfactory to the parties, can be achieved. Accordingly, it is ordered that within ten days from the date of the filing of this order, the parties, through their respective counsel, contact the Honorable Harry R. McCue, United States Magistrate, Southern District of California, United States Courthouse, 940 Front Street, San Diego, California 92189, telephone (619) 557-5585, and establish the time and place for an initial settlement conference. The initial settlement conference shall be held within thirty (30) days from the date of the filing of this order, subject to such extensions as the Magistrate may authorize. Settlement negotiations shall be concluded within ninety (90) days from the date of the filing of this order. If the case has not been settled within these time constraints, an opinion or memorandum disposition deciding the case will be issued.

The panel has considered the complicated nature of this case and the issues presented. It recognizes that settlement cannot be achieved without constructive participation by the parties. It is confident, however, that if settlement discussions are undertaken in good faith with realistic recognition by all parties that reasonable accommodations must be made,

settlement can be achieved and that settlement will serve the best interests of the parties.

The Navajo Nation and the Hopi Tribe, although not parties to this litigation, have filed *amici curiae* briefs and have a significant interest in the outcome of this case. Accordingly, they and their counsel are invited and urged to participate in the settlement proceedings hereby ordered.

Submission of this case is withdrawn pending further order of this court.